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No. 06-1645

FILED
AUG 13 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

MARIE INEZ CRAVENS, ET AL.,

Petitioners,

v.

CITY OF LA MARQUE, TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether an alleged drunk driver is denied due process of law by a police officer who fails to arrest the drunk driver who later dies in a fatal car accident and, if so, whether the police officer's municipal employer may be held liable for the officer's isolated conduct?

PARTIES

Petitioners are Marie Inez Cravens, individually and on behalf of the Estate of Abner Cravens, Deceased and all wrongful death and survival action beneficiaries including Tony Cravens, Natasha Cravens and Loretta Cravens, as next friend of L.C., a minor.

Respondent is the City of La Marque, Texas.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporation is a party to this action.

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JURISDICTIONAL STATEMENT

A. Petitioners claim this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

B. The Fifth Circuit Court of Appeals had jurisdiction over Petitioners' appeal from the District Court's final judgment under 28 U.S.C. § 1291. [R 130].

C. The District Court had original jurisdiction over Petitioners' claims under 28 U.S.C. § 1331. [R 5-20; 115-130].

D. The memorandum opinion and Order granting Respondent's motion to dismiss was entered on February 28, 2006. [R 115-129].

E. The District Court entered final judgment in Respondent's favor on February 28, 2006. [R 130].

F. On March 28, 2006, Petitioners filed a notice of appeal of the final judgment entered by the District Court. [R 131-133].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Procedural History

This lawsuit arises from the alleged misconduct of former City of La Marque, Texas police officer Ricardo Ontiveros,[1] who chose not to arrest Decedent Abner Cravens, who was involved in a minor traffic accident. After Officer Ontiveros completed his investigation, the Decedent drove away and was subsequently involved in a second accident in a neighboring city which resulted in the Decedent's death. Petitioners allege the Decedent was intoxicated at the time of both accidents and that Officer Ontiveros

[1] Petitioners do not even mention any other City police officer in their Complaint.

should have prevented the Decedent from driving away after the first accident investigation. [R 5-20; R 115-129].

Petitioners, survivors and representatives of Decedent's estate, brought suit against the City under 42 U.S.C. § 1983 alleging the City denied the Decedent substantive due process of law and equal protection of the laws[2] under the Fourteenth Amendment to the United States Constitution.[3] Petitioners premise their claims upon the contention that a constitutionally protected *special relationship* existed between Officer Ontiveros and the Decedent and that Officer Ontiveros subjected the Decedent to *state created danger*. [R 5-20; R 115-129].

The District Court had original jurisdiction over Petitioners' claims under 28 U.S.C. § 1331. [R 5-20; 115-129]. The City filed a motion to dismiss for failure to state a claim, and accompanying memorandum of law in support thereof, under FED. R. CIV. P. 12(b)(6). [R 26-51]. Petitioners filed a response in opposition to the Defendant's motion to dismiss. [R 59-70]. The City, thereafter, filed a reply to Petitioners' opposition briefing. [R 93-100]. Finding that Petitioners failed to state a claim upon which relief could be granted, the District Court granted the City's motion to dismiss and entered final judgment in favor of the City. [R 115-130]. Petitioners filed a notice of appeal. [R 131-132].

B. Petitioners' Allegations

In their brief in the Fifth Circuit Court of Appeals, Petitioners succinctly set out their claim: "[T]he heart of

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[2] The Petitioners abandoned their appeal of the dismissal of the Equal Protection claims. [Petitioners' Brief in the Court of Appeals at p. 12].

[3] Petitioners brought claims against former Officer Ontiveros in a different lawsuit.

the Complaint against Officer Ontiveros can be simply stated; he knew that [Decedent] was obviously intoxicated, cut-off private sources of aid and permitted [the Decedent] to drive away." [Petitioners' Brief in the Fifth Circuit Court of Appeals at p. 6]. Petitioners therefore admit their claims are based upon the sole contention that Officer Ontiveros did nothing more than release the Decedent from the officer's investigatory presence in an alleged intoxicated state. [Petitioners' Petition at pp. 3-6; Brief at p. 6].[4]

More specifically, Petitioners alleged in their Complaint that the Decedent drove his vehicle into the rear of his cousin's vehicle on a public roadway in the City of La Marque. The Decedent's cousin was concerned for the Decedent's safety because he appeared to be intoxicated so she called the police. Officer Ontiveros investigated the accident, was told the Decedent was "apparently intoxicated" and needed help. Officer Ontiveros observed the Decedent's condition and knew he was in no condition to drive. Officer Ontiveros informed those at the scene he would take care of it. Those at the scene believed Officer Ontiveros' assurance and left the Decedent's well being in Officer Ontiveros' hands.

Officer Ontiveros detained the Decedent for questioning for only minutes. Although the officer had probable cause to arrest the Decedent for driving while intoxicated, Officer Ontiveros failed to arrest the Decedent. Instead, after the accident investigation, the Decedent drove away in an intoxicated state posing a danger to himself and

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[4] The foundation of Petitioners' claims implodes because it rests entirely upon the invalid legal premise that a police officer has a ministerial duty to arrest every potentially drunk driver he encounters. [Petitioners' Brief].

others. Family members and other concerned individuals were on the scene of the initial accident and were in the process of helping and protecting the Decedent from himself when Officer Ontiveros arrived.[5] Shortly after being released to drive away from the accident in La Marque, the Decedent drove his vehicle head on into another car and the Decedent died in the second accident. [R 8-11].

Petitioners further allege that Officer Ontiveros had no discretion but, instead, was obligated to take custody of the Decedent and render him protective care because of his known level of intoxication. According to Petitioner, under the circumstances, the act of arresting the Decedent had been reduced to a mere ministerial task. [R 12].

Although Petitioners claim the City is responsible for Officer Ontiveros' failure to seize the Decedent, Petitioners' Complaint lacks a *single factual allegation* in support of this assertion. Petitioners simply conclude the City had inadequate customs regarding enforcement of state DWI laws. [R 126-127]. Furthermore, even Petitioners' briefing reveals the City fired Officer Ontiveros after the Decedent's death, finding the officer *violated* City policy. [Petitioners' Brief at 5-6, 14].

SUMMARY OF THE ARGUMENT

The Fifth Circuit Court of Appeals did not err in affirming the District Court's dismissal of Petitioners' claims pursuant to FED. R. CIV. P. 12(b)(6). The record establishes that the Decedent was not denied due process of law. Petitioners failed to allege facts showing any

[5] Petitioners' Complaint also includes the conclusory argument that Officer Ontiveros discouraged others from assisting the Decedent but this assertion is not supported by any factual allegations.

constitutionally protected special relationship between the City or former Officer Ontiveros and the Decedent. Likewise, Petitioners failed to allege facts showing a viable claim under the so-called state created danger theory of recovery, if any such claim can exist.

Furthermore, even if Petitioners had alleged facts supporting a claim against former Officer Ontiveros, Petitioners' allegations do not support a claim against the City. Petitioners' Complaint reveals that the alleged deprivation of which the Petitioners complain was an isolated occurrence that was not the result of City policy. Petitioners also failed to allege facts showing the fault of any City official, aside from Officer Ontiveros, and certainly no policymaker who could support a claim against the City. Petitioners also failed to allege facts showing the City was deliberately indifferent to any known risk allegedly caused by its customs. Lastly, Petitioners failed to allege facts showing any City policy or custom was a moving force which caused the Decedent's alleged constitutional injury.

REASONS FOR DENYING THE WRIT

Although the Petitioners cite 28 U.S.C. § 1254(1) as a jurisdictional basis for this Court's review, their challenge underscores the reasons for Supreme Court Rule 10, this Court's procedural rule which identifies the character of reasons considered in the grant or denial of a petition for writ of certiorari. Rule 10 provides:

> Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> * * *
>
> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

SUP. CT. R. 10.

Neither criterion is met here. In reality, this case presents nothing more than a circuit court's correct application of well established legal principles to specific, yet infirm, factual allegations in a single case. For the reasons that follow, this Court's jurisdiction is not invoked under any prong of Rule 10. Therefore, the petition should be denied.

A. No Constitutionally Protected "Special Relationship" Existed

The record in this case shows that no constitutionally protected special relationship existed between the Decedent and the City or Officer Ontiveros. Historically, "[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right of bodily integrity." *Albright v.*

Oliver, 510 U.S. 266, 272, 114 S. Ct. 807, 812 (1994). "As a general matter, the [Supreme] Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 1068 (1992). As such, "the Supreme Court has cautioned federal courts to use 'judicial self-restraint' and 'exercise the utmost care' when asked [as Petitioners do here] to find new rights secured by the Due Process Clause." See *Saenz v. Heldenfels Brothers Inc.*, 183 F.3d 389, 392 (5th Cir. 1999).

It is fundamental that due process protects only against an "exercise of power without any reasonable justification in the service of a legitimate governmental objective" and "government power arbitrarily and oppressively exercised." *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 1716 (1998). The Due Process Clause "was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196, 109 S. Ct. 998, 1003 (1989) (quoting *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S. Ct. 668, 670 (1986)). "Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers [of the Constitution] were content to leave the extent of governmental obligation in the latter area to the democratic political processes." *DeShaney*, 489 U.S. at 196, 109 S. Ct. at 1003.

"[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Lewis*, 523 U.S. at 846, 118 S. Ct. at 1716 (quoting *Collins*, 503 U.S. at 129, 112 S. Ct. at 1071). Therefore, to state a claim of an alleged violation of Due Process, a plaintiff must show a

defendant's action shocks the conscience and was so brutal and offensive as to fail to comport with traditional ideas of fair play and decency. See *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 209-210 (1952); *Brown v. Nationsbank Corp.*, 188 F.3d 579, 591 (5th Cir. 1999). Consistent with this approach "when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates 'the large concerns of the governors and the governed.'" *Lewis*, 523 U.S. at 853, 118 S. Ct. at 1720 (quoting *Daniels v. Williams*, 474 U.S. at 332, 106 S. Ct. at 665). "Consistent with these principles, [this Court's decisions] have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney,* 489 U.S. at 195, 109 S. Ct. 1603.

This Court has unmistakably held that the Due Process Clause does not generally require the government to protect the life, liberty or property of an individual against harm caused by private violence. *DeShaney*, 489 U.S. at 195, 109 S. Ct. at 1003. The Due Process Clause, instead, is "a limitation on the State's power to act, not [] a guarantee of certain minimal levels of safety and security." *Id.* While the government cannot lawfully exercise its authority to deprive an individual of due process of law, the government has no constitutionally created duty to ensure any specific individual's interests are not harmed by other means. *Id.* Therefore, "[i]f the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that

could have been averted had it chosen to provide them." *DeShaney*, 489 U.S. at 196-197, 109 S. Ct. at 1003-1004.

This Court has discussed the very few types of "limited circumstances" in which "the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *DeShaney*, 489 U.S. at 198, 109 S. Ct. at 1004. This duty of care is limited to only those circumstances in which the government "takes a person into its custody and holds him there against his will." *DeShaney*, 489 U.S. at 200, 109 S. Ct. at 1005; see also *Beltran v. City of El Paso,* 367 F.3d 299, 307 (5th Cir. 2004); *Randolph v. Cervantes*, 130 F.3d 727, 730-731 (5th Cir. 1997). In such circumstances, "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expression of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *DeShaney*, 489 U.S. at 200, 109 S. Ct. at 1005-1006.

Therefore, this Court, in *DeShaney*, expressly rejected the notion Petitioners assert here; that a constitutionally protected "special relationship" can exist in a non-custodial situation which requires the government to protect a particular individual.[6] *Id.* The argument urged by the Petitioners here is the same argument DeShaney raised unsuccessfully in this Court nearly twenty years ago. *DeShaney*, 489 U.S. at 197, 109 S. Ct. at 1004. DeShaney argued that, even if the Due Process Clause did not impose a duty to "provide the general public with

[6] Curiously, while the Petitioners claim a "*DeShaney* special relationship duty" and a "*DeShaney* state-created danger duty" supports their claims, Petitioners fail to discuss the facts of the *DeShaney* case, the analysis applied or its holding which specifically rejected both of these claimed duties.

adequate protective services, such a duty may arise out of certain 'special relationships' created or assumed by the State with respect to particular individuals." *Id.* DeShaney further argued in support of his contention:

> that such a "special relationship" existed [t]here because the State knew [he] faced a special danger of abuse at his father's hands, and specifically proclaimed, by word and by deed, its intention to protect him against that danger. Having actually undertaken to protect [DeShaney] from this danger – which [p]etitioners concede[d] the State had no role in creating – the State acquired an affirmative "duty," enforceable through the Due Process Clause, to do so in a reasonably competent fashion. Its failure to discharge that duty, so the argument goes, was an abuse of governmental power that so "shocks the conscience," as to constitute a substantive due process violation.

DeShaney, 489 U.S. at 197, 109 S. Ct. at 1004.[7]

Assuming Petitioners' pleading allegations are true, Officer Ontiveros knew the Decedent was obviously intoxicated, passersby did not intervene further because of Officer Ontiveros' presence and Officer Ontiveros permitted the Decedent to drive away. Giving credence to these allegations, however, Officer Ontiveros did nothing more

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[7] In note 4 of the *DeShaney* opinion, this Court discussed that the "genesis" of such an argument arose when several Courts of Appeals misinterpreted dicta in this court's opinion in *Martinez v. California*, 444 U.S. 277, 100 S. Ct. 553 (1980) to support such a notion. Even though this Court, in *DeShaney*, squarely confronted the question presented there and here – "whether the Due Process Clause imposed upon the State an affirmative duty to protect" – this has not prevented some plaintiffs from continuing to misinterpret this Court's dicta to support such a notion as evidenced by the many cases now emanating on alleged "special relationship" or "state created danger" theories.

than release the Decedent from the officer's investigatory presence[8] in an alleged intoxicated state. This simply does not support a claim under the Due Process Clause. See *id.*

In light of the Petitioners' pleading allegations, the Decedent could not even arguably be considered to have been in the custody necessary to create a constitutional duty. Compare, *Losinski v. County of Trempealeau*, 946 F.2d 544, 550 (7th Cir. 1992) (custody implies restraint which is simply not present here). "The overarching prerequisite for custody is an affirmative act by the state that restrains the ability of an individual to act on his own behalf." *Jackson v. Schultz*, 429 F.3d 586, 590 (6th Cir. 2005). "The mere fact that the police exercise control over an environment is alone insufficient to demonstrate that a person is seized." *Carver v. City of Cincinnati*, 474 F.3d 283, 286 (6th Cir. 2007). Even where an officer has probable cause to affect an arrest but chooses not to restrain the individual, there is no *custody* for purposes of a due process claim. *Id.*

The Petitioners' allegations plainly reveal their real criticism of Officer Ontiveros' conduct is that, although he allegedly had probable cause to arrest the Decedent for driving while intoxicated, Ontiveros failed to make the arrest. Instead, Officer Ontiveros only briefly questioned the Decedent during the accident investigation and then the Decedent drove away.

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[8] The Petitioners argument that the brief interaction between the Decedent and Officer Ontiveros during the course of the brief period of the accident investigation constituted a seizure for purposes of creating a special relationship cannot stand in light of the facts in *DeShaney*. In *DeShaney*, the State had actually taken custody of DeShaney but subsequently released him back to his father and this was not deemed sufficient "custody" to invoke 14th Amendment protections upon his return. *DeShaney*, 489 U.S. at 201, 109 S. Ct. at 1006.

> As the Supreme Court has clearly pronounced, however, "the benefit that a third party may receive from having someone [] arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural, nor substantive, manifestations. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768, 125 S. Ct. 2796, 2810 (2005). This result reflects [this Court's] continuing reluctance to treat the Fourteenth Amendment as a font of tort law . . . "

Id. at 2810 (internal quotations omitted).

In *Castle Rock,* the plaintiff argued that a police officer's failure to arrest a criminal suspect under a state *mandatory arrest* statute violated Due Process, but this Court held directly to the contrary. In delivering the opinion of the Court, Justice Scalia discussed the "deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands." *Id.* at 2806. It is simply "common sense that all police officers must use some discretion in deciding when and where to enforce [the law]." *Chicago v. Morales*, 527 U.S. 41, 62, 119 S. Ct. 1849 n. 32 (1999). "Discretion is essential to the criminal justice process." *McCleskey v. Kemp*, 481 U.S. 279, 297, 107 S. Ct. 1756, 1770 (1987); see also *Hudson v. Hudson*, 475 F.3d 741, 744 (6th Cir. 2007); *Beltran*, 367 F.3d at 306.

The Petitioners do not even allege that a *mandatory* arrest statute was applicable to the facts of this case. To the contrary, the applicable Texas arrest statute provides only that "a peace officer *may* arrest an offender without a warrant for any offense committed in his presence or within his view." TEX. CRIM. PRO. § 14.01(b) (emphasis added). As such, Petitioners' allegations do not even approach the less than constitutional dimensions observed in *Castle Rock*. Therefore, the foundation of Petitioners'

legal position is invalid and unsustainable under controlling jurisprudence because Officer Ontiveros was not required under the Constitution to detain the Decedent, even if he was drunk, and because, as the undisputed record shows, the Decedent was not, in fact, detained. See *Gonzales*, 125 S. Ct. at 2806.

As in *DeShaney*, "[t]he most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." *DeShaney*, 489 U.S. at 203, 109 S. Ct. at 1007. Thus, the Petitioners' allegations, as well as their briefing, plainly show that Officer Ontiveros did not subject the Decedent to incarceration, institutionalization, or any other similar restraint of personal liberty this Court has recognized to support a claim under the Due Process Clause. See *id.*; see also *Jackson v. Schultz*, 429 F.3d 586, 590-591 (5th Cir. 2005). In *DeShaney*, this Court expressly rejected the notion Petitioners assert here; that a constitutionally protected "special relationship" can exist in a non-custodial situation which requires the government to protect a particular individual.[9] *Id.*

Petitioners contend, as did the Petitioners in *DeShaney*, that a law enforcement officer knew an individual faced a danger and that the officer proclaimed by word and deed his intention to protect the individual against that danger. *DeShaney*, 489 U.S. at 197, 109 S. Ct. at 1004. Also, as in *DeShaney*, Petitioners argue that – as in state tort law – a constitutionally mandated duty to protect should

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[9] Curiously, while the Petitioners claim a "*DeShaney* special relationship duty" and a "*DeShaney* state-created danger duty" supports their claims, Petitioners fail to discuss the facts of the *DeShaney* case or its holding which specifically rejected both of these claimed duties.

be imputed to a law enforcement officer who undertakes to protect an individual from harm. *Id.*; see also *Beltran*, 367 F.3d at 307. This Court must, as its precedent instructs, again "reject this argument." *Id.* at 198.

In this case, as Justice Rehnquist explained for the Court in *DeShaney*, "[t]he affirmative duty to protect arises not from the State's knowledge of the [Decedent's] predicament or from its expression of intent to help him, but from the limitation which it has imposed on his freedom to act on his own benefit." *DeShaney*, 489 U.S. at 200, 109 S. Ct. at 1005-1006; see also *Rivera v. Houston Independent School District*, 349 F.3d 244, 248 (5th Cir. 2003).

> In the substantive due process analysis, it is [only] the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to protect his liberty interests against harms inflicted by other means.

Id.; see also *McClendon v. City of Columbia*, 305 F.3d 314, 324 (5th Cir. 2002); *Randolph*, 130 F.3d at 730; *Walton v. Alexander*, 44 F.3d 1297, 1303-1004 (5th Cir. 1995).

Thus, this is not the type of "limited circumstance" in which the Constitution imposes a duty of care or protection to a particular individual. See *DeShaney*, 489 U.S. at 198, 109 S. Ct. at 1004. Officer Ontiveros **did not take the Decedent into custody and hold him there against his will**, as required to support such a claim. See *DeShaney*, 489 U.S. at 200, 109 S. Ct. at 1005. A duty to protect did not arise from Officer Ontiveros' mere alleged knowledge of the Decedent's state of intoxication or from Officer Ontiveros' expression of intent to help the Decedent.

Officer Ontiveros simply had no duty to protect the Decedent from the later self-inflicted harm which caused his death because Officer Ontiveros imposed no limitation on the Decedent which impeded his freedom to act on his own behalf, as would be required to support a claim for which relief could be granted. See *DeShaney*, 489 U.S. at 200, 109 S. Ct. at 1005-1006.

Therefore, because this Court expressly rejected the same arguments in *DeShaney*, which Petitioners urge here, their claims of alleged denial of Due Process based upon the contention that Officer Ontiveros failed to protect the Decedent, fails as the Fifth Circuit Court of Appeals correctly held. See *id.* Accordingly, discretionary review is unwarranted because the United States Fifth Circuit Court of Appeals has not entered a decision which conflicts with any decision of this Court or any other United States court of appeals on the same important matter. See SUP. CT. R. 10. To the contrary, Petitioners urge this Court to accept the unprecedented, and constitutionally unsupportable, notion that a constitutionally protected special relationship is created under facts which establish otherwise. Officer Ontiveros and the City simply had no duty under the Constitution to protect the Decedent from his own self-destructive act of recklessly driving while intoxicated; therefore, the presiding District Court and the Fifth Court of Appeals correctly applied established legal principles to the specific factual circumstance alleged by Petitioners.

B. No Claim Existed Based Upon "State Created Danger"

The record likewise shows that no claim existed based upon an alleged state created danger theory. Prominently, this Court, like the Fifth Circuit Court of Appeals, has

never recognized a substantive due process claim based upon what is now known as state created danger theory. Compare *Sanford v. Stiles*, 456 F.3d 298, 304 (3rd Cir. 2006); *Rivera*, 349 F.3d at 249.

Some courts have construed a few words in *DeShaney* as this Court's acknowledgement that a due process claim can be brought based upon danger created by the government. As discussed above, in *DeShaney*, DeShaney claimed a violation of due process as follows:

> Having actually undertaken to protect [DeShaney] from this danger – which [p]etitioners concede **the State had no role in creating** – the State acquired an affirmative "duty," enforceable through the Due Process Clause, to do so in a reasonably competent fashion. Its failure to discharge that duty, *so the argument goes*, was an abuse of governmental power that so "shocks the conscience," as to constitute a substantive due process violation.

DeShaney, 489 U.S. at 197, 109 S. Ct. at 1004 (emphasis added).

In response to these contentions urged by DeShaney, this Court explained:

> While the State may have been aware of the dangers that [DeShaney] faced in the free world, **it played no part in their creation**, nor did it do anything to render him any more vulnerable to them.

DeShaney, 489 U.S. at 201, 109 S. Ct. at 1006 (emphasis added).

While this language, obviously authored, in response to DeShaney's particular contentions, certainly does not show that this Court would have found a due process violation even if the State had played some role in creating the risk of harm to DeShaney. Sadly, however, this statement made

in reference to DeShaney's contentions has spawned the Petitioners' claims in the instant suit, claiming that this Court's use of the words "State, creation and danger" provide a basis for a substantive due process claim that would not otherwise exist under the Constitution nor would be cognizable under this Court's precedents.[10]

Notably, while the Petitioners have gleaned the words "State, creation and danger" from *DeShaney*, they have wholly ignored the legal analysis and facts in the case, both of which cast great doubt on the viability of the state created danger *theory*. On the *DeShaney* record, this Court discussed that Winnebago County Department of Social Services was aware of a potential risk of harm to DeShaney and had even taken temporary custody of him from his father to protect him from this threat of harm before returning him to a potentially unsafe environment. Because, however, DeShaney was not in State custody when he was injured and because he was injured by a danger that existed before State intervention; Winnebago County Department of Social Services **played no role in creating the danger** that ultimately caused DeShaney harm. *Id.* This Court's conclusion on the *DeShaney* record, thus, cannot support a claim under a state created danger theory here.

The Petitioners complain because the Fifth Circuit has yet to identify a cognizable state created danger claim in light of this Court's decision in *DeShaney,* although it has had many invitations to recognize the theory based upon various factual circumstances. See *Rios v. City of Del Rio,*

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[10] This Court, of course, is not required to follow its "dicta in a prior case in which the point now at issue was not fully debated." *Central Virginia Community College v. Katz*, 546 U.S. 356, 363, 126 S. Ct. 990, 996 (2006).

Tex., 444 F.3d 417, 427 (5th Cir. 2006); *Jackson*, 429 F.3d at 591-592; *Hernandez v. Texas Department of Protective and Regulatory Services*, 380 F.3d 872 (5th Cir. 2004); *Beltran*, 367 F.3d at 299; *Rivera*, 349 F.3d at 244; *Morin v. Moore*, 309 F.3d 316, 321 (5th Cir. 2002); *McClendon*, 305 F.3d at 314; *Piotrowski v. City of Houston*, 237 F.3d 567 (5th Cir. 2001); *Saenz*, 183 F.3d at 391-392; *Randolph*, 130 F.3d at 731; *Piotrowski v. City of Houston*, 51 F.3d 512 (5th Cir. 1995); *Johnson v. Dallas Independent School District*, 38 F.3d 198 (5th Cir. 1994); *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992). Contrary to the Petitioners' argument, however, the Fifth Circuit's repeated rejection of state created danger claims is well-grounded in clear Supreme Court authority. See *id.*

The Fifth Circuit has discussed the likely requirements necessary to support a state created danger claim, if one can be deemed viable. See *id.* In order to support a claim under a state created danger theory, the Fifth Circuit has assumed a plaintiff must, at a minimum, show a state actor created or increased the danger to a plaintiff and that the state actor acted with deliberate indifference to the risk.[11] *Morin*, 309 F.3d at 321-322. Petitioners' claims fail under both prongs of this test, as discussed fully *infra*.

1. Officer Ontiveros Did Not Create a Dangerous Environment

Petitioners' allegations instead establish that Officer Ontiveros did not *create* a dangerous environment. To the contrary, Petitioners' contention is that Officer Ontiveros did not *prevent the Decedent from acting imprudently, but*

[11] Some Circuits require additional elements to support such a claim. See *Sanford*, 456 F.3d at 304-305; *Jackson*, 429 F.3d at 591.

on his own.[12] "Where a claimant accuses government officials of failing to prevent one private party from injuring another, *DeShaney*, and its progeny seldom permit the claim to proceed." *Koulta v. Merciez*, 477 F.3d 442, 443 (6th Cir. 2007) (internal citations omitted). "[E]qual doses of private-party foolishness, governmental incompetence (assuming as we must, the truth of the allegations) and public anguish" do not necessarily establish a civil rights claim under the 14th Amendment. *Id.*

"[T]he Constitution does not require the government to protect citizens from privately created danger." *Witkowski v. Milwaukee County*, 480 F.3d 511, 513 (7th Cir. 2007). Also, merely offering ineffective aid to an individual who is later injured does not amount to state creation of danger. *Losinski*, 946 F.2d at 550. "It is not a constitutional violation for a state actor to render incompetent [] assistance or fail to rescue those in need." *Jackson*, 429 F.3d at 590. Thus, "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter." *DeShaney*, 489 U.S. at 201, 109 S. Ct. at 1006.

"If the danger to the plaintiff existed prior to the state's intervention, then even if the state put the plaintiff back in that same danger, the state would not be liable because it could not have created a danger that already existed." *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253, 1263 n. 7 (10th Cir. 1998). "[T]o be liable, [state actors] must have used their authority to create an opportunity that would not otherwise have existed for the third party's

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[12] A claimant's attempt to re-characterize a mere failure to protect claim as affirmative government action by creative allegations cannot change the true nature of a state created danger claim. *Sanford*, 456 F.3d at 312; *Bright v. Westmoreland*, 443 F.3d 276, 283 n. 6 (3rd Cir. 2006).

crime to occur." *Rivera*, 349 F.3d at 249 (quoting *Johnson*, 38 F.3d at 201). Petitioners' allegations undeniably fail under this test.[13]

Petitioners allege the Decedent drove a vehicle while intoxicated before he was involved in a traffic accident that Officer Ontiveros investigated, as well as *after* he was involved in that accident. Petitioners also admit that family members and other concerned citizens recognized at the scene of the initial accident, both *before* Officer Ontiveros' arrival and *after* the Decedent's departure, that he was in no condition to care for himself but failed to provide him with assistance, or even wise advice. Petitioners also admit that Officer Ontiveros permitted the Decedent to drive away from the initial accident scene after the investigation and that he was not in State custody at the time of the subsequent fatal accident.

In their best light, Petitioners' claim that Officer Ontiveros was aware of dangers the Decedent faced but not that Officer Ontiveros *created* those dangers. Petitioners' allegations also claim that Officer Ontiveros had no intention of harming the Decedent or that Officer Ontiveros did anything to render the Decedent any more vulnerable to danger than he was before encountering Officer Ontiveros. These allegations cannot support a claim under the state created danger theory.[14] See *Piotrowski*, 237 F.3d at 584.

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[13] Petitioners claims also fail because they seek to apply the state created danger theory in a circumstance in which the Decedent succumbed to his *own misconduct*, not that of any *third party*, as presumably would be required to support a claim. See *Rivera*, 349 F.3d at 249.

[14] As discussed further below, this record would not support a state created danger, even in jurisdictions outside the Fifth Circuit.

Not only do the Petitioners' allegations disprove that Officer Ontiveros *used his authority*, they also show that he did not use his authority to *create an opportunity* that would not otherwise have existed for the Decedent to be injured. The relevant "[q]uestion is not whether the victim was safer *during* the state action, but whether [he] was safer before the state action than [he] was *after* it." *Jones v. Reynolds*, 438 F.3d 685, 692 (6th Cir. 2006).

A police officer's decision to allow, or even encourage reckless driving, cannot support a substantive due process claim when the officer simply leaves an individual in no worse position than he was already in because the officer's action does not *increase* the risk of harm. *Id.* Again, "*DeShaney* and its progeny make it clear that the police have no affirmative obligation to protect citizens from drunk drivers. Taken to an extreme, police officers could watch drunk drivers stumble to their cars and drive off, weaving across the road, without incurring section 1983 liability." *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993). When officers' actions do not create or increase the risk that an innocent victim will be killed by drunken driving, a substantive due process claim simply fails, as a matter of law. *Koulta*, 477 F.3d at 443.

A law enforcement officer's failure to remove a drunken driver from the roads simply does not state a claim for violation of substantive due process. *Saenz,* 183 F.3d at 391-392. In *Saenz*, two law enforcement officers came upon Jose Zuniga, who both officers suspected of driving while intoxicated. The senior officer prevented the junior officer from investigating whether Zuniga was intoxicated. A short time later, Zuniga was involved in a traffic accident in which he and others were injured. *Saenz,* 183 F.3d at 389. Denying a claim of substantive due

process, the *Saenz* Court held that the senior law enforcement officer was "neither aware of an immediate danger facing a known victim, nor did he use his authority to prevent the [plaintiffs] from receiving aid." *Id.*

As in *Saenz*, the Petitioners' Decedent was not denied due process because, as the Fifth Circuit plainly held, Officer Ontiveros was likewise neither aware of an immediate danger facing a known victim, nor did he use his authority to prevent the Decedent from receiving aid. The Petitioners, therefore, face a legally "insurmountable hurdle" because the Decedent was no worse off driving while intoxicated after his encounter with Officer Ontiveros than he was driving while intoxicated before his contact with the officer. See *Reed*, 986 F.2d at 1125-1126. Stated simply, failure to prevent the Decedent from *continuing to* drive while intoxicated cannot state a claim of state created danger, even if such a claim is otherwise legally cognizable. See *Reed*, 986 F.2d at 1127. "At worse, [Officer Ontiveros] left [the Decedent] in the same position as [he] would have been in had [Officer Ontiveros] not intervened at all. It follows that [Officer Ontiveros] did not increase the risk of harm to [the Decedent], even if he [permitted him] to drive while under the influence of alcohol." See *Wyatt v. Krzysiak*, 82 F.Supp. 2d 250, 259 (D. Del. 1999).

Petitioners' claims fail also because there is no factual allegation that Officer Ontiveros prevented the Decedent from acting on his own behalf or obtaining help from others. When an injured person – like the Decedent here – remains free to voluntarily help himself, or be helped by others, he cannot be said to be cut off from aid. *Jackson*, 429 F.3d at 591-592. There are no factual allegations that Officer Ontiveros involuntarily subjected the Decedent to any known danger. *Losinski*, 946 F.2d at 550-551. Likewise,

there are no allegations any attempt to provide private aid was made to the Decedent. See *Carver*, 474 F.3d at 287. Accordingly, Petitioners' "failure to protect" or "state created danger" claim fails, even if such a claim may theoretically exist consistent with the Court's precedent, because Officer Ontiveros did not subject the Decedent to any dangerous environment created by Officer Ontiveros. See *Saenz*, 183 F.3d at 392.

2. Officer Ontiveros Did Not Act with Deliberate Indifference

Petitioners' allegations also establish that Officer Ontiveros did not act with deliberate indifference. The Fifth Circuit has discussed that, assuming *arguendo* the state created danger theory could be cognizable at all, a plaintiff must show not only that a state actor created a dangerous environment, but also that a state actor acted with deliberate indifference. See *Piotrowski*, 51 F.3d at 515. "[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 410, 117 S. Ct. 1382, 1391 (1997). Deliberate indifference, thus, is a high burden for a plaintiff to overcome. *Doe v. Dallas Independent School District*, 153 F.3d 211, 218 (5th Cir. 1998). "There is a significant distinction between a tort and a *constitutional* wrong." *Benavides v. Herrera*, 883 F.2d 385, 388 (5th Cir. 1989). Allegations of mere negligence fail to establish culpability under a constitutional claim. *Daniels v. Williams*, 474 U.S. 327, 328, 106 S. Ct. 662, 663 (1995).

"To act with deliberate indifference, a state actor must consciously disregard a known and excessive risk to the

victim's health and safety." *Hernandez*, 380 F.3d at 880. Stated differently, to establish deliberate indifference, in a state created danger context, a police officer must have actual knowledge of and disregard an excessive risk to a plaintiff's health or safety. *McClendon*, 305 F.3d at 326. "A state actor's failure to alleviate 'a significant risk that he should have perceived but did not,' . . . does not rise to the level of deliberate indifference." *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979 (1994)). "[A]ctions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference . . . " *Hernandez*, 380 F.3d at 883.

Petitioners' allegations here reveal nothing more than simple negligence, at most. Petitioners allege they trusted Officer Ontiveros' alleged representation he would take care of the situation and left the Decedent's well-being in Officer Ontiveros' hands. In essence, Petitioners' allegations are that Officer Ontiveros "stood by and did nothing when suspicious circumstances dictated a more active role for [him]," but allegations of this type simply do not implicate constitutionally protected interests. See *DeShaney*, 489 U.S. at 201, 109 S. Ct. at 1007; *Saenz*, 183 F.3d at 392; *Piotrowski*, 237 F.3d at 584 (the City at most left the Decedent in an already dangerous position).

Likewise, Petitioners' allegations pertaining to Officer Ontiveros' exercise of discretion in failing to arrest an allegedly intoxicated driver, or in extending so-called "special favors" to family members of law enforcement officers, even when considered in a light most favorable to Petitioners, sound in negligence and, therefore, fail to support a constitutional claim. See *Beltran*, 367 F.3d at 307-308; *McClendon*, 305 F.3d at 326-327. Moreover, this "special favor" allegation disproves any assertion that

Officer Ontiveros consciously disregarded a known and excessive risk to the Decedent's health and safety. See *Hernandez*, 380 F.3d at 880; *McClendon*, 305 F.3d at 326. These allegations, if proven, would show Officer Ontiveros was attempting to provide a benefit to the Decedent; not to use governmental authority to harm him. See *id.* "[Officer Ontiveros'] decision, while imprudent and ultimately tragic, was not sufficiently willful and targeted toward specific harm to remove the case into the domain of constitutional law." *Saenz*, 183 F.3d at 392.

Moreover, a police officer cannot be said to have been deliberately indifferent to rise to the level of a violation of a plaintiff's rights when the plaintiff himself was also responsible for placing himself in a potentially dangerous condition. See *Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71, 81 (1st Cir. 2005); *Witkowski*, 480 F.3d at 513. Clearly Petitioners' allegations are that the Decedent's death resulted from his own illegal and imprudent acts of driving while intoxicated, not those of any third party. Officer Ontiveros, therefore, cannot be said to have been deliberately indifferent to a known risk for a *third party's crime* to occur. See *Johnson*, 38 F.3d at 201. State created danger simply cannot be premised upon, as here, an alleged failure of government to protect an individual who subsequently suffers a self-inflicted injury. See *id.* Accordingly, Petitioners' claims fail on this ground as well.

Certainly, this Court's decision in *DeShaney* cannot reasonably be interpreted to have expanded substantive due process to include the Petitioners' claim. Therefore, even if a claim based upon state created danger can theoretically occur – consistent with constitutional principles – this record cannot support such a claim. Thus, the presiding District Court and the Fifth Circuit Court of

Appeals correctly applied established legal principles to the specific factual circumstance alleged by Petitioners and correctly dismissed the Petitioners' suit. Accordingly, discretionary review is unwarranted.

C. Petitioners Fail to Allege Facts which State a Claim Against the City

1. There is no Unconstitutional City Policy or Custom

Because there was no unconstitutional conduct, the Petitioners' claims against the City were properly dismissed. If a plaintiff is not the victim of a constitutional deprivation, it is irrelevant whether a city policy or custom would have authorized the conduct of which a plaintiff complains. *City of Los Angeles v. Heller*, 475 U.S. 797, 811, 106 S. Ct. 1571, 1573 (1986); *McKee v. City of Rockwall*, 877 F.2d 409, 414 (5th Cir.), cert. denied, 493 U.S. 1023 (1990).

Moreover, even if Petitioners could support a claim against former Officer Ontiveros individually, there is still no showing the City violated the Constitution. See *Brown*, 520 U.S. at 397, 403, 117 S. Ct. at 1382, 1388. To establish governmental liability on a claim under § 1983, a plaintiff must show a constitutional deprivation and then identify a policy or custom he alleges caused the constitutional violation. *Piotrowski*, 237 F.3d at 578. Petitioners simply do not allege facts of any unconstitutional City policy or custom. Instead, Petitioners merely assert bare conclusions, unsupported by any substantive factual allegations, that the City had a practice of:

> [F]ailing to enforce DWI laws; failing to train officers in enforcement of DWI laws; failing to review and enforce policies & procedures; failing to educate officers regarding a duty to equally

> enforce the laws; failing to review officer conduct; failure to discover incompetent police officers; allowing officers discretion in arresting intoxicated drivers and allowing officers to extend special favors to family members of law enforcement officers.[15]

Conclusory assertions of this sort, masquerading as *allegations*, cannot support a claim for which relief could be granted. See *Spiller v. City of Texas City*, 130 F.3d 162, 167 (5th Cir. 1997). Moreover, there is no allegation any City policymaker can be held culpable under § 1983. Unconstitutional conduct alleged must "be directly attributable to the municipality through some sort of official action or imprimatur; isolated unconstitutional actions by municipal employees will almost never trigger liability." *Piotrowski*, 237 F.3d at 578; see also *Latuszkin v. City of Chicago*, 250 F.3d 502, 505 (7th Cir. 2001). Here, as the District Court discussed, Petitioners do not even mention any officer other than Officer Ontiveros, thus claims against the City fail.

2. No City Policy or Custom Caused the Decedent's Harm

Petitioners' claims against the City also fail because there is no showing any City policy was a "moving force" which caused the Decedent a constitutional injury. See *Monell*, 436 U.S. at 694, 98 S. Ct. at 2037-2038. "[I]t is not enough for a § 1983 plaintiff merely to identify conduct

[15] As discussed *supra*, a police officer is entitled to exercise discretion in arrest situations; therefore, even if these assertions included factual allegations – which they don't – the policies urged are plainly not required under the Constitution. See *Gonzales*, 125 S. Ct. at 2808. None of the alleged "policies" are facially unconstitutional.

properly attributable to the municipality. The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the moving force behind the injury alleged." *Brown,* 520 U.S. at 404, 117 S. Ct. at 1388. It is crucial that the requirements of governmental culpability and governmental causation "not be diluted, for '[w]here a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability.'" *Id.* (quoting *Snyder v. Trepagnier,* 142 F.3d 791 (5th Cir. 1998)). Petitioners fail to allege facts showing any City policy or custom *caused* a violation of the Decedent's federally protected rights, therefore, Petitioners' claims were properly dismissed.

CONCLUSION

The District Court correctly determined, and the Fifth Circuit Court of Appeals correctly affirmed, that Petitioners' allegations failed to meet the pleading requirements of FED. R. CIV. P. 12(b)(6). The Petitioners failed to allege facts showing a constitutionally justifiable special relationship between the Decedent and former Officer Ontiveros or the City. Additionally, the Petitioners failed to allege facts supporting a claim under a state created danger theory. Petitioners' allegations disprove the assertion Officer Ontiveros created a dangerous environment and establish Officer Ontiveros was not deliberately indifferent to any known risk of harm to the Decedent.

Moreover, even if Petitioners could support a claim under against former Officer Ontiveros, Petitioners' allegations do not support a claim against the City. The isolated deprivation the Petitioners allege was not the result of any City policy or custom. Furthermore, there are no allegations showing any City policy or custom was a

moving force which caused the Decedent's alleged constitutional injury.

Discretionary review is, thus, unwarranted in this case because the United States Fifth Circuit Court of Appeals has not entered a decision which conflicts with any decision of this Court or any other United States court of appeals on the same important matter. To the contrary, the Petitioners urge this Court to accept the unprecedented notion that a constitutionally protected special relationship is created under facts which establish otherwise. Officer Ontiveros and the City simply had no duty under the Constitution to protect the Decedent from his own self-destructive act of recklessly driving while intoxicated; therefore, the presiding District Court and the Fifth Circuit Court of Appeals correctly applied established legal principles to the specific factual circumstance alleged by Petitioners.

For these reasons, this Honorable Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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